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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT

MEMORANDUM:

DATE: December 18, 1978

SUBJECT: Interpretation of "Constructed" as it Applies to
Activities Undertaken Prior to Issuance of a PSD
Permit

FROM: Director
Division of Stationary Source Enforcement

TO: Enforcement Division Directors
Regions I-X

Air and Hazardous Materials Division Directors
Regions I-X

The issue addressed in this memorandum is where on the continuum from planning to operation of a major emitting facility does a company or other entity violate the PSD regulations if it has not yet received a PSD permit. (It is assumed here that such a permit is required by the PSD regulations.) This question has arisen several times in particular cases and general guidance now appears necessary.

The statute and regulations do not answer this question. The Clean Air Act states simply that, "[n]o major emitting facility ... may be constructed ... unless - (1) a permit has been issued ... [and various other conditions have been satisfied]." Section 165(a). Similarly, the PSD regulations state that, "[n]o major stationary source or major modification shall be constructed unless the [various PSD requirements are met]." 40 CFR 52.21(i)(1), 43 FR 26406. "Construction" is defined in the regulations as "fabrication, erection, installation, or modification of a source." 40 CFR 52.21(b)(7), 43 FR 26404. This accords with Section 169(2)(C) of the Act, but it does not explicitly answer the question posed above. To our knowledge, the legislative history of the Act does not treat this issue. Thus the term "constructed" seems to be open to further interpretation by EPA.

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Commencement of construction is quite specifically defined in both Section 169(2)(A) of the Clean Air Act and 40 CFR 52.21(b)(8), 43 FR 26404. However, that definition is for the purpose of deciding the threshold question of the applicability of the PSD regulations. Therefore, we are not bound by it in deciding what activities may be conducted prior to receiving a necessary PSD permit.

DSSE's response to date has been that the permitting authority should make the determination on a case-by-case basis, after considering all the facts of the individual situation. For example, we said that site clearing might be inappropriate for a source proposed to be constructed in a heavily forested Class I area, but permissible for a source proposed to be constructed on a junk-strewn lot in a heavily industrialized Class III area.

After consulting with the Office of General Counsel, we are now

amending this policy in order to minimize the administrative burden on the permitting authority and to adopt what we believe now to be the better legal interpretation. The new policy is that certain limited activities will be allowed in all cases. These allowable activities are planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials. Any activities undertaken prior to issuance of a PSD permit would, of course, be solely at the owner's or operator's risk. That is, even if considerable expense were incurred in site-clearing and purchasing equipment, for example, there would no guarantee that a PSD permit would be forthcoming.

All on-site activities of a permanent nature aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances. These prohibited activities include installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature.

The new policy has several advantages. First, it will be easy to administer, since case-by-case determinations will not be required. Moreover, it assures national consistency and permits no abuse of discretion. Finally, it appears to be the most legally correct position. The policy has the undeniable disadvantage of allowing a good deal of

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activity at sites which may be highly susceptible to environmental impact. We feel that on balance, however, the advantages of the policy outweigh the disadvantage.

If you any questions, please feel free to contact David Rochlin of my staff, at 755-2542.

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